

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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MANUEL STEVEN GUARDADO,

Petitioner,

v.

NEVADA ATTORNEY GENERAL, et al.,

Respondents.

Case No. 3:10-cv-00103-MMD-WGC

ORDER

This action is a *pro se* petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 by a Nevada state prisoner. Before the Court is respondents' motion to dismiss the amended petition (dkt. no. 48) and petitioner's renewed motion for the appointment of counsel (dkt. no. 52).

**I. PROCEDURAL HISTORY**

On February 11, 2004, the State of Nevada filed an indictment in the Second Judicial District Court for the State of the Nevada charging petitioner with two counts of burglary, one count of possession of burglary tools, one count of first-degree arson, one count of conspiracy to commit first-degree arson, and three counts of possession of stolen property. (Exh. 7.)<sup>1</sup> The State subsequently filed notice of its intent to have petitioner adjudicated a habitual criminal on May 19, 2004. (Exh. 19.)

Pursuant to a plea agreement, petitioner pled guilty to two counts of burglary, one count of first-degree arson, and three counts of possession of stolen property

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<sup>1</sup>The exhibits referenced in this order are found in the Court's record at dkt. nos. 16-22 and 49.

1 (Exh. 32.) In exchange for petitioner's plea, the State agreed to dismiss the charges of  
2 conspiracy to commit first-degree arson, possession of burglary tools. (*Id.*) Additionally,  
3 the State agreed not to seek petitioner's adjudication as a habitual criminal. (*Id.*) On  
4 November 5, 2004, the state district court sentenced petitioner to two consecutive  
5 prison terms of 48 to 120 months for the two burglary charges, a consecutive term of 72  
6 to 180 months for the arson charge, and consecutive terms of 24 to 60 months for the  
7 three possession of stolen property charges. (Exh. 33, at 15-16.) The judgment of  
8 conviction was filed on November 5, 2004. (Exh. 34.)

9 Petitioner appealed his conviction to the Nevada Supreme Court. (Exh. 37.) On  
10 August 18, 2005, the Nevada Supreme Court affirmed petitioner's conviction. (Exh. 52.)  
11 Remittitur issued on September 13, 2005. (Exh. 53.)

12 On October 12, 2005, petitioner filed a *pro se* post-conviction habeas petition in  
13 the state district court. (Exh. 54.) On December 26, 2006, petitioner filed a supplement  
14 to the petition. (Exh. 60.) On January 9, 2008, the state district court appointed counsel  
15 to assist petitioner. (Exh. 62.) Petitioner's counsel filed a second supplemental habeas  
16 petition on April 30, 2007. (Exh. 65.) After holding an evidentiary hearing, the state  
17 district court denied the petition by order filed October 8, 2008. (Exh. 87.) Petitioner  
18 appealed the denial to the Nevada Supreme Court. (Exh. 89.) On February 3, 2010, the  
19 Nevada Supreme Court affirmed the state district court's denial of the post-conviction  
20 habeas petition. (Exh. 107.) Remittitur issued on March 2, 2010. (Exh. 108.)

21 Petitioner dispatched his federal petition for writ of habeas corpus to this Court  
22 on February 18, 2010. (Dkt. no. 9, at p. 1, item 5.) Respondents moved to dismiss the  
23 petition. (Dkt. no. 15.) By order filed September 12, 2011, this Court granted  
24 respondents' motion in part, dismissing the Fourth and Eighth Amendment claims in  
25 Grounds 2, 4, 5, 8, 9, 10, 11, 12 and 13. (Dkt. no. 31.) The Court also ruled that  
26 Grounds 1, 3, 6, 7, 8, 9, 10, 11 and 13 of the petition were unexhausted; petitioner was  
27 given options for dealing with his unexhausted grounds. (*Id.*) Petitioner moved to stay  
28 this action so that he could return to state court to exhaust his grounds for relief. (Dkt.

1 no. 32.) On December 27, 2011, this Court granted petitioner's motion for a stay and  
2 abeyance pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005). (Dkt. no. 35.)

3 Petitioner returned to state court and filed a second post-conviction habeas  
4 petition on February 3, 2012. (Exh. 116.) The state district court dismissed the petition  
5 on March 28, 2012. (Exh. 118.) Petitioner appealed the dismissal of his second state  
6 habeas petition to the Nevada Supreme Court. (Exh. 120.) On November 14, 2012, the  
7 Nevada Supreme Court issued an order affirming the state district court's dismissal of  
8 the second state habeas petition. (Exh. 131.) Remittitur issued on December 10, 2012.  
9 (Exh. 133.)

10 On December 13, 2012, petitioner filed a motion to lift the stay in this proceeding.  
11 (Dkt. no. 36.) Petitioner also filed a motion for the appointment of counsel, which this  
12 Court denied. (Dkt. nos. 37 & 38.) This Court granted petitioner's motion to reopen the  
13 case, and directed petitioner to file an amended petition within thirty days. (Dkt. no. 38.)  
14 Petitioner failed to file an amended petition within the allotted time period, and  
15 respondents filed a motion for an order requiring petitioner to show cause why the  
16 instant case should not be dismissed for failure to comply with the Court's order. (Dkt.  
17 no. 41.) Petitioner filed an amended petition on March 12, 2014, which raises eleven  
18 grounds for relief. (Dkt. no. 47.) Petitioner filed a motion for reconsideration of the  
19 Court's denial of his motion for the appointment of counsel, which the Court denied by  
20 order filed September 10, 2014. (Dkt. nos. 39 & 54.) Respondents have filed the instant  
21 motion to dismiss the amended petition. (Dkt. no. 48.) Petitioner filed a response to the  
22 motion to dismiss and a renewed motion for the appointment of counsel. (Dkt. nos. 51 &  
23 52.)

## 24 **II. PETITIONER'S RENEWED MOTION FOR COUNSEL**

25 By order filed September 10, 2014, this Court denied petitioner's motion for  
26 reconsideration of the Court's denial of his motion for the appointment of counsel and  
27 denied his second motion for the appointment of counsel. (Dkt. no. 54.) Petitioner has  
28 filed his third motion for the appointment of counsel. (Dkt. no. 52.) There is no

1 constitutional right to appointed counsel for a federal habeas corpus proceeding.  
 2 *Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987); *Bonin v. Vasquez*, 999 F.2d 425, 428  
 3 (9th Cir. 1993). The decision to appoint counsel is generally discretionary. *Chaney v.*  
 4 *Lewis*, 801 F.2d 1191, 1196 (9th Cir. 1986), *cert. denied*, 481 U.S. 1023 (1987); *Bashor*  
 5 *v. Risley*, 730 F.2d 1228, 1234 (9th Cir.), *cert. denied*, 469 U.S. 838 (1984). This Court  
 6 denied petitioner's prior motions for the appointment of counsel. (Dkt. nos. 8, 38, 54.)  
 7 Petitioner has presented nothing in the present motion that would persuade this Court to  
 8 alter its prior decision denying the appointment of counsel. Petitioner's most recent  
 9 motion for the appointment of counsel is denied.

### 10 **III. RESPONDENTS' MOTION TO DISMISS**

#### 11 **A. Procedural Default Principles**

12 Respondents argue that all grounds of the amended petition are procedurally  
 13 barred. (Dkt. no. 48.) In *Coleman v. Thompson*, 501 U.S. 722 (1991), the United States  
 14 Supreme Court held that a state prisoner's failure to comply with the state's procedural  
 15 requirements in presenting his claims is barred from obtaining a writ of habeas corpus in  
 16 federal court by the adequate and independent state ground doctrine. *Coleman*, 501  
 17 U.S. at 731-32 ("Just as in those cases in which a state prisoner fails to exhaust state  
 18 remedies, a habeas petitioner who has failed to meet the State's procedural  
 19 requirements for presenting his federal claims has deprived the state courts of an  
 20 opportunity to address those claims in the first instance."). Where such a procedural  
 21 default constitutes an adequate and independent state ground for the denial of habeas  
 22 corpus relief, the default may be excused only "if a constitutional violation has probably  
 23 resulted in the conviction of one who is actually innocent," or if the prisoner  
 24 demonstrates cause for the default and prejudice resulting from it. *Murray v. Carrier*,  
 25 477 U.S. 478, 496 (1986).

26 A state procedural bar is "adequate" if it is "clear, consistently applied, and well-  
 27 established at the time of the petitioner's purported default." *Calderon v. United States*  
 28 *District Court (Bean)*, 96 F.3d 1126, 1129 (9<sup>th</sup> Cir. 1996) (quoting *Wells v. Maass*, 28

1 F.3d 1005, 1010 (9<sup>th</sup> Cir. 1994)); *see also King v. Lamarque*, 464 F.3d 963, 966-67 (9<sup>th</sup>  
 2 Cir. 2006). A state procedural bar is “independent” if the state court “explicitly invokes  
 3 the procedural rule as a separate basis for its decision.” *Vang v. Nevada*, 329 F.3d  
 4 1069, 1074 (9<sup>th</sup> Cir. 2003). A state court’s decision is not “independent” if the application  
 5 of the state’s default rule depends on the consideration of federal law. *Park v. California*,  
 6 202 F.3d 1146, 1152 (9<sup>th</sup> Cir. 2000); *see also Coleman*, 501 U.S. at 735 (there is no  
 7 independent state ground for a state court’s application of procedural bar when the  
 8 court’s reasoning rests primarily on federal law or is interwoven with federal law).

9 **B. Grounds 1, 3, 6, 7, 8, 9 and 10**

10 In the order of September 12, 2011, this Court determined that Grounds 1, 3, 6,  
 11 7, 8, 9, 10, 11 and 13 of the original federal petition were unexhausted. (Dkt. no. 31.)  
 12 Petitioner returned to state court and filed a second state habeas petition containing  
 13 each of the thirteen grounds raised in the original federal petition. (Exh. 116.) The state  
 14 district court ruled that the second state habeas petition was untimely pursuant to NRS  
 15 § 34.726 and that there was no good cause for petitioner’s delay. (Exh. 118.) The  
 16 Nevada Supreme Court affirmed the dismissal of all claims in the second state habeas  
 17 petition because the petition was untimely pursuant to NRS § 34.726(1) and successive  
 18 pursuant to NRS § 34.810(2.) (Exh. 131.) The Nevada Supreme Court also ruled that  
 19 petitioner failed to demonstrate cause and prejudice to overcome the procedural default.  
 20 (*Id.*) The Ninth Circuit has held that the Nevada Supreme Court’s application of the  
 21 timeliness rule in NRS § 34.726(1) is an independent and adequate state law ground for  
 22 procedural default. *Moran v. McDaniel*, 80 F.3d 1261, 1268-70 (9<sup>th</sup> Cir. 1996); *see*  
 23 *Valerio v. Crawford*, 306 F.3d 742, 778 (9<sup>th</sup> Cir. 2002). The Ninth Circuit also has held  
 24 that, at least in non-capital cases, application of the abuse of the writ rule of NRS §  
 25 34.810(2) is an independent and adequate state ground for procedural default. *Vang v.*  
 26 *Nevada*, 329 F.3d 1069, 1074 (9<sup>th</sup> Cir. 2003); *Bargas v. Burns*, 179 F.3d 1207, 1210-12  
 27 (9<sup>th</sup> Cir. 1999).

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1 In the instant case, this Court finds that the Nevada Supreme Court's application  
2 of the procedural bars of NRS § 34.726(1) and NRS § 34.810(2) were independent and  
3 adequate grounds for the court's dismissal of petitioner's claims. The claims in  
4 petitioner's amended petition that correspond to the unexhausted grounds of the original  
5 petition are amended ground 1 (original ground 1), amended ground 3 (original ground  
6 3), amended ground 6 (original ground 6), amended ground 7 (original ground 8),  
7 amended ground 8 (original ground 9), amended ground 9 (original ground 10), and  
8 amended ground 10 (original ground 11). *Compare* dkt. no. 47 (amended petition) *with*  
9 dkt. no. 9 (original petition). Because the Nevada Supreme Court rejected these claims  
10 on the basis of state procedural rules, the corresponding claims in the amended petition  
11 are procedurally defaulted. Grounds 1, 3, 6, 7, 8, 9 and 10 of the amended petition are  
12 procedurally barred from federal review and will be dismissed with prejudice unless  
13 petitioner can show cause and prejudice to excuse the procedural bar, or that failure to  
14 consider the defaulted claim will result in a fundamental miscarriage of justice.

15 **C. Grounds 2, 4 and 5**

16 In his second state habeas petition, petitioner presented not only those claims  
17 that this Court determined were unexhausted in its order of September 12, 2011, but  
18 also claims challenging: (1) trial counsel's failure to file suppression motions and  
19 advising petitioner to plead guilty without performing investigations (which corresponds  
20 to ground 2 of the amended federal petition); (2) the validity of the plea agreement due  
21 to petitioner's alleged misunderstanding that the plea could be withdrawn (which  
22 corresponds to ground 4 of the amended federal petition); and (3) the validity of the plea  
23 agreement due to alleged coercion by trial counsel, the prosecutor, and police (which  
24 corresponds to ground 5 of the amended federal petition). (Exh. 116 and dkt. no. 47.)  
25 The Nevada Supreme Court affirmed the dismissal of all claims in the second state  
26 habeas petition because the petition was untimely pursuant to NRS § 34.726(1) and  
27 that petitioner failed to demonstrate cause and prejudice to overcome the procedural  
28 default. (Exh. 131.) The Nevada Supreme Court's application of the timeliness rule in

1 NRS § 34.726(1) is an independent and adequate state law ground for procedural  
 2 default. See *Moran v. McDaniel*, 80 F.3d 1261, 1268-70 (9<sup>th</sup> Cir. 1996); see *Valerio v.*  
 3 *Crawford*, 306 F.3d 742, 778 (9<sup>th</sup> Cir. 2002).

4 In this case, the Nevada Supreme Court's application of the procedural bar of  
 5 NRS § 34.726(1) was an independent and adequate ground for the court's dismissal of  
 6 petitioner's claims. Because the Nevada Supreme Court rejected these claims on the  
 7 basis of state procedural rules, the corresponding claims in the amended petition are  
 8 procedurally defaulted. Grounds 2, 4 and 5 of the amended federal petition are  
 9 procedurally barred from federal review and will be dismissed with prejudice unless  
 10 petitioner can show cause and prejudice to excuse the procedural bar, or that failure to  
 11 consider the defaulted claim will result in a fundamental miscarriage of justice.

#### 12 **D. Cause and Prejudice/Fundamental Miscarriage of Justice**

13 To overcome a claim that was procedurally defaulted in state court, a petitioner  
 14 must establish either (1) cause for the default and prejudice attributable thereto or (2)  
 15 that failure to consider the defaulted claims will result in a "fundamental miscarriage of  
 16 justice." *Harris v. Reed*, 489 U.S. 255, 262 (1989) (citations omitted). To prove a  
 17 "fundamental miscarriage of justice," petitioner must show that the constitutional error of  
 18 which he complains "has probably resulted in the conviction of one who is actually  
 19 innocent." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (citing *Murray v. Carrier*,  
 20 477 U.S. at 496). To demonstrate cause for a procedural default, the petitioner must  
 21 "show that some objective factor external to the defense impeded" his efforts to comply  
 22 with the state procedural rule. *Murray*, 477 U.S. at 488. For cause to exist, the external  
 23 impediment must have prevented the petitioner from raising the claim. See *McClesky v.*  
 24 *Zant*, 499 U.S. 467, 497 (1991).

25 In his response to the motion to dismiss, petitioner has not addressed the issue  
 26 of procedural default. Petitioner has not made a showing that this Court's failure to  
 27 consider the procedurally defaulted claims will result in a fundamental miscarriage of  
 28 justice. Petitioner also has not shown cause and prejudice to excuse the procedural

1 default, as he has not asserted any reason for his failure to timely raise all claims in his  
2 first state habeas petition. This Court finds that all grounds raised in the amended  
3 federal petition were procedurally defaulted in state court, and petitioner has failed to  
4 show either a fundamental miscarriage of justice, or cause and prejudice to excuse the  
5 procedural default. As such, all grounds of the amended petition are barred from review  
6 by this Court and will be dismissed with prejudice.

#### 7 **IV. CERTIFICATE OF APPEALABILITY**

8 District courts are required to rule on the certificate of appealability in the order  
9 disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a  
10 notice of appeal and request for certificate of appealability to be filed. Rule 11(a). In  
11 order to proceed with his appeal, petitioner must receive a certificate of appealability. 28  
12 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9<sup>th</sup> Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946,  
13 950-951 (9<sup>th</sup> Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir.  
14 2001). Generally, a petitioner must make “a substantial showing of the denial of a  
15 constitutional right” to warrant a certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2);  
16 *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). “The petitioner must demonstrate that  
17 reasonable jurists would find the district court’s assessment of the constitutional claims  
18 debatable or wrong.” *Id.* (quoting *Slack*, 529 U.S. at 484). In order to meet this threshold  
19 inquiry, the petitioner has the burden of demonstrating that the issues are debatable  
20 among jurists of reason; that a court could resolve the issues differently; or that the  
21 questions are adequate to deserve encouragement to proceed further. *Id.* In this case,  
22 no reasonable jurist would find this Court’s dismissal of the petition debatable or wrong.  
23 The Court therefore denies petitioner a certificate of appealability.

#### 24 **V. CONCLUSION**

25 It is therefore ordered that petitioner’s renewed motion for the appointment of  
26 counsel (dkt. no. 52) is denied.


27 It is further ordered that respondents’ motion to dismiss (dkt. no. 48) the  
28 amended petition is granted.

1 It is further ordered that the amended petition is dismissed with prejudice as  
2 procedurally barred.

3 It is further ordered that petitioner is denied a certificate of appealability.

4 It is further ordered that the Clerk of Court shall enter judgment accordingly.

5 DATED THIS 5<sup>th</sup> day of February 2015

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9 MIRANDA M. DU  
10 UNITED STATES DISTRICT JUDGE  
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